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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BRIAN JOHN DEUTSCH, an Incompetent Person, etc., et al., Plaintiffs and Appellants, v. CITY OF CALISTOGA et al., Defendants and Respondents.	A152236 (Napa County Super. Ct. No. 26-66780)

Brian John Deutsch by and through his guardian ad litem, Jennifer Deutsch, and Jennifer Deutsch (collectively plaintiffs) appeal a judgment entered in favor of the City of Calistoga (the city) on their complaint for damages arising out of a car accident involving Brian Deutsch and defendant Michael Perreault, who at the time was a city police officer. They contend the court erred in granting summary judgment in favor of the city because triable issues of fact exist as to the city's liability for the negligent operation of the motor vehicle by Perreault and the negligent staffing decisions by the city's police chief. In addition, they contend the court erred in denying their motion for leave to amend their complaint to add a cause of action against the city for breach of a mandatory duty under Government Code[1] section 815.6. We find no error and, therefore, we shall affirm the judgment.

[1] All statutory references are to the Government Code unless otherwise noted.

Factual and Procedural Background

At 6:18 a.m. on December 4, 2014, Brian Deutsch was severely injured when Perreault's car crossed the center highway divider and collided with Brian Deutsch's car. Following the denial of plaintiffs' section 910 claim against the city, plaintiffs filed a complaint alleging two causes of action for negligence against Perreault and the city. The first cause of action for negligent operation of a motor vehicle alleges that Perreault's negligent operation of his car caused the accident and that the city is liable because at the time of the accident Perreault was operating the vehicle in the course of his employment. The second cause of action for general negligence alleges that "unknown specific supervisors" negligently allowed Perreault "to work excessive hours and then allow[ed] him to drive home."

The complaint incorporates the following allegations from plaintiffs' section 910 claim against the city: "City of Calistoga Police Officer Michael Perreault was on duty and had worked two or more consecutive shifts and had worked more than the maximum hours allowed in the 48 hours authorized by contract/agreement or law as of 06:18 a.m. on 12-4-14. [¶] The Chief of Police of the City of Calistoga, and/or his designated representative worked Officer Michael Perreault beyond the normal limits of human endurance. He, she or they knew or should have known that Officer Michael Perreault resided in Hidden Valley, CA, and that he commuted back and forth to his home on [State Route] 29, a steep, windy, narrow and potentially treacherous two-lane road. He, she or they knew or should have known it was foreseeable that Officer Michael Perreault, on the day in question, would not be as sharp or focused as he should have been that day on the drive home and that it was foreseeable, if not likely, he would lose control of his vehicle and/or fall asleep at the wheel causing a collision. It is well known that a person who is driving without adequate sleep is as poor at driving as a driver under the influence of alcohol. [¶] The City of Calistoga Police Department negligently over-worked Officer Michael Perreault and thereafter negligently allowed him to drive home on 12-4-14. That day, after completing his assignment, Officer Perreault, drove in excess of a speed that was safe for the conditions, apparently dozed off and/or fell asleep, losing control of his

car, crossed over the double yellow center line into the oncoming lane and crashed head on into plaintiff Brian John Deutsch who suffered a severe brain injury. [¶] Claimants allege that Officer Perreault, while commuting on 12-4-14 was running an errand or was on a special mission for the City of Calistoga. In addition, the City of Calistoga incidentally benefited from Officer Perreault's commute. Further, the City of Calistoga required Officer Perreault to drive to and from his place of duty so that his vehicle was available for City of Calistoga business. Moreover, the City of Calistoga required Officer Perreault to wear his uniform and render emergency assistance while driving to and from work. The City of Calistoga compensated him for travel time to and from work. As alleged above, Officer Perreault's activities at work were a substantial factor in causing the accident which is the subject of this claim. The foregoing are all recognized exceptions to the so called 'going and coming' rule. [¶] The City of Calistoga benefited from Office Michael Perrault's services prior to 06:18 on 12-4-14 and now the City of Calistoga should be responsible for the consequences of same because of its understaffing the City of Calistoga Police Department."

The city moved for summary judgment on the grounds that it is not liable for Perreault's negligence because he was not operating his vehicle in the course of his employment, and that undisputed facts establish that Perreault had not worked excessive hours in the days prior to the accident, negating negligence on the part of the police chief. The city argued further that it is immune from liability arising out of discretionary staffing decisions by its employees. The trial court granted the motion for summary judgment and thereafter entered judgment in the city's favor. Plaintiffs timely filed a notice of appeal.

Discussion

1. Standard of Review

" 'The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' [Citation.] A defendant is entitled to summary judgment only if 'no issues of triable fact appear and the moving

party is entitled to judgment as a matter of law.' [Citations.] [¶] 'On appeal from a summary judgment, we conduct an independent review, applying the same three-step process as the trial court.' [Citations.] (1) Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought. (2) We then examine the moving party's motion, including the evidence offered in support of the motion. A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit, either because 'one or more of the elements of the cause of action cannot be ... established' [citation] or because defendant 'establishes an affirmative defense to that cause of action.' [Citation.] (3) If defendant's moving papers make a prima facie showing that justifies a judgment in defendant's favor, the burden then shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citations.] Summary judgment is proper if all the papers submitted show that there is no issue requiring a trial as to any fact that is necessary under the pleadings. [Citations.] In such a case the moving party is entitled to judgment as a matter of law." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 158-160.)

2. The undisputed facts establish that Perreault was not acting in the scope of his employment at the time of the accident.

Under section 815, subdivision (a), "Except as otherwise provided by statute: [¶] A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Section 815.2, subdivision (a), includes one such exception providing that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

Generally, "[a]n employee is not considered to be acting within the scope of employment when going to or coming from his or her place of work." (*Anderson v. Pacific Gas & Electric Co.* (1993) 14 Cal.App.4th 254, 258.) "This is based on the

concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling." (*Baptist v. Robinson, supra,* 143 Cal.App.4th at p. 162.) "The courts, however, have recognized several exceptions to the 'going and coming' rule." (*Ducey v. Argo Sales Co*. (1979) 25 Cal.3d 707, 722.) In particular, "exceptions will be made to the 'going and coming' rule where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." (*Hinman v. Westinghouse Elec. Co*. (1970) 2 Cal.3d 956, 962.) Among the types of cases in which this situation may arise are "cases where the employer requires an employee to furnish a vehicle of transportation on the job." (*Ducey, supra,* at p. 723.) Similarly, an exception to "going and coming" rule is permitted when an employer sends an employee on a "special errand" while going to or coming from work. (*Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280, 291.) An employee can be on a special errand during her commute if she is acting according to a specific directive by respondent or engaging in a regular duty of her employment. (*Id.* at pp. 291-292.)

The city submitted the following as undisputed material facts in support of its motion: Perreault's shift "ended at 6:00 a.m. on December 4, 2014 when Perreault went off duty to drive to his residence." Before leaving to go home, Perreault changed out of his police uniform. Perrault was driving his personal vehicle at the time of the accident. The city did not pay Perreault wages for his time commuting to his home nor did the city pay for any of Perreault's expenses related to the operation of his personal vehicle. At the time of the accident, Perreault was not on "an errand for the city" nor was he "engaging in any law enforcement or police duties/actions." Although Perreault had his police issued radio with him at the time of the accident, the radio was not "on" and he was not monitoring any police radio traffic as he drove home.

Plaintiffs dispute that Perreault was "off-duty" at the time of the accident. They rely on deposition testimony by the police chief that when an officer ends his shift, he should be checked out of the dispatch system but that Perreault was not logged out of the

dispatch system on December 4 until 7:46 a.m. Plaintiffs also submitted undisputed evidence that Perreault used his police radio to summon help after the accident.[2]

In response, the city cites the police chief's deposition testimony and declaration in which he explains that there was no set practice for checking out at the end of a shift. The chief testified that the department had an informal system: "[W]hen somebody comes on and someone's leaving, it's pretty obvious that they're leaving either because they've dressed out and they say 'Good-Bye.' " The chief testified that he saw Perreault leave the department wearing his civilian clothes around 6:00 a.m. the morning of the accident. The chief offered several possible explanations for dispatch's failure to log Perreault out of the system until well after the accident: "[T]he dispatcher just forgot to take him out, the dispatcher could have said, 'Hey can you' — [and] left it for the other dispatcher and she didn't know that, until she goes, 'Oh, he's still on it,' and then took him out. . . . [I]t's just a record of activity. . . . [I]t may not be accurate as far as when somebody stated versus when somebody left."

"Although it is generally a question of fact whether conduct is within the scope of employment, if the facts are undisputed and no conflicting inferences are possible, the question is one of law." (*Baptist v. Robinson*, *supra*, 143 Cal.App.4th at p. 162.) Here, the city met its burden of showing that Perreault was not acting in the scope of his employment at the time of the accident. The undisputed facts establish that Perreault's shift ended at 6:00 a.m., he changed out of his police uniform and into his personal clothes, drove his personal car home, was not compensated for his commute, and was not engaging in any law enforcement duties or actions. Perreault used his two-way police

[2] In the trial court, plaintiffs also disputed the fact that Perreault was not paid for expenses relating to the operation of his car. They suggested that Perreault "was eligible for reimbursement for use of his personal vehicle," but the evidence cited in support of their objection establishes only that if an officer is required to attend a training more than 35 miles from the department and chooses to drive in a personal vehicle, the officer is entitled to a mileage reimbursement. The trial court rejected plaintiffs' argument, noting that there is no evidence to support plaintiffs' assertion that Perreault was eligible for reimbursement for use of his personal vehicle. Plaintiffs have not challenged this conclusion on appeal.

radio only after he was unable to make a phone call on his cellphone due to a lack of reception. The fact that the dispatcher did not log Perreault out of the system until after 7:00 a.m. does not give rise to a triable issue of fact as to whether Perreault was on-duty at the time of the accident.

Contrary to plaintiffs' argument, the police chief's declaration, submitted in support of the city's motion for summary judgment, was admissible. The chief's statement in his declaration that Perreault was off-duty after his shift ended at 6:00 a.m. does not contradict his previous deposition testimony. As quoted above, the chief explained at his deposition that there was no fixed practice for checking out at the station at the end of a shift and the failure to log off with dispatch did not necessarily mean he was still on duty.

Plaintiffs also argue that the city was not permitted to rely on Perreault's deposition testimony because Perrault was not an "adverse party" to the city under Code of Civil Procedure section 2025.620. Whether or not the deposition would be usable for any of the purposes specified in section 2025.620, that statute applies by its terms to "trial, or any other hearing in the action." In contrast, the summary judgment statute specifically contemplates the use of deposition transcripts in support of or in opposition to a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (b)(1) & (2); *Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380.) Even assuming that section 2025.620 does not authorize the use of Perreault's deposition testimony, nothing in that section limits its use as authorized by section 437c, subdivisions (b)(1) and (b)(2).

Plaintiff also asserts that the court erred in failing to sustain his hearsay objection to the traffic collision report which the city cited in support of its summary judgment motion. (Veh. Code, § 20013.) The report is cited in the city's separate statement of undisputed facts in support of the facts relating to the automobile accident itself. Those facts are supported by other admissible evidence and, in all events, none of those facts relate to the grounds on which summary judgment was granted. Thus, plaintiff is not correct that if his objections had been sustained, summary judgment would have been improper.

Accordingly, the undisputed facts establish that Perreault was not acting in the scope of his employment at the time of the accident. Thus, the city can not be held vicariously liable under the first cause of action for Perreault's alleged negligent operation of a motor vehicle.

3. The city is not liable for the accident based on the police chief's scheduling and staffing decisions.

Plaintiffs' complaint alleges that Perreault fell asleep while driving home because the police chief negligently allowed Perreault to work excessive hours and then drive home. The city moved for summary judgment on the ground that, among other things, defendant had not worked "excessive hours" leading up to the accident and thus his work schedule was not a proximate cause of the accident. The city presented evidence that on the evening of December 2, 2014, Perreault returned to work following a 10-day vacation and worked a standard 12-hour shift. He was off-duty at 6:00 a.m. on December 3 and he returned to work around 5:00 p.m. that evening. When he left the police station at 6:00 a.m. on the morning of December 4, he had worked his standard 12-hour shift plus one hour of overtime. As the city argues, the hours Perrault worked in the days before the accident were not excessive and negate any claim that he was overworked.

Plaintiffs do not dispute these facts. They do contend that the court erred in excluding the declaration of their expert, Dr. Abraham Ishaaya, which they argue would have created a triable issue of fact as to whether the accident was caused, at least in part, by Perreault's work schedule. Dr Ishaaya's declaration explained generally that "shift work—such as working the graveyard shift [disrupts] the body's normal 'master clock' and sleep pattern. This is because the body naturally wants to sleep during the hours of darkness. When the [supra-chiasmatic nucleus] senses darkness, melatonin production is increased in the body. Trying to stay awake during the graveyard shift, for example, is inconsistent with the circadian rhythm. Thus, shift workers' sleep is out of phase with their normal cycle. Most shift workers will not sleep adequately, trying to sleep during daytime hours, and against their natural circadian rhythm." He added, "Reliable and authoritative studies show that there is a higher incidence of accidents by shift workers"

and "[s]hift workers routinely get less sleep as well as lower quality of sleep than workers on the day shift." Finally, based on Perreault's inability to recall at the time of his deposition the essential details about what happened just prior to the accident and his review of Perrault's medical records, he concluded that Perreault was "more likely than not asleep at the wheel just prior to the collision."

Nothing in Dr. Ishaaya's declaration creates a triable issue of fact as to whether Perreault worked "excessive hours" in advance of the accident. While the expert's statements about shift workers may be true generally, they are of little relevance in this case where the employee had just returned from a 10-day vacation and had only worked two shifts, with one hour of overtime. Moreover, after the accident, Perreault told the investigating highway patrol officer that he was not tired and felt quite awake before the accident.[3] As the trial court noted, the expert's contrary opinion ignores Perreault's statements to the investigator and "instead speculates regarding . . . Perreault's state the morning of the accident based on studies that working the night shift makes people tired."

In conclusion, the undisputed evidence establishes that Perreault had not worked excessive hours in advance of the accident and that his work schedule was not a proximate cause of the accident. Accordingly, the city cannot be held liable under the second cause of action for the police chief's alleged negligent decisions.[4]

4. The court did not err in denying plaintiffs request for leave to amend.

Plaintiffs sought leave to amend their complaint to allege a third cause of action under section 815.6, which provides that "[w]here a public entity is under a mandatory

[3] Plaintiffs' objections to the highway patrol officer's deposition testimony lack merit. For the reasons explained above, the investigating officer's deposition testimony was not made inadmissible by Code of Civil Procedure section 2025.620. Moreover, we do not rely on the officer's opinion as to the cause of the accident, so that we need not consider plaintiffs' objection that the officer was not an expert in accident reconstruction. Finally, in the trial court plaintiffs did not object on hearsay grounds to the officer's testimony regarding his conversation with Perreault.

[4] In light of this conclusion, we need not address the city's additional argument that it is immune from liability for the police chief's staffing and scheduling decisions.

duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Plaintiffs sought to allege that the city breached two mandatory duties imposed under its memorandum of understanding (MOU) with the police officers association. First, they allege that the city breached its duty to provide officers with 12 hours off-duty between shifts as allegedly required by article 19 of the MOU[5] by requiring Perreault to work one hour of overtime on December 3. Second, they allege that the city breached its duty to require Perreault to have an annual physical as required by article 27 of the MOU.[6] They allege further that had the city required the physical exam, it would have learned that Perreault had obstructive sleep apnea and therefore that it was unsafe to allow him to work the 12-hour graveyard shift and force him to work mandatory overtime.

The trial court correctly denied leave to amend on the ground that the MOU is a contract, not an enactment. An "enactment" under section 815.6 includes "a constitutional provision, statute, charter provision, ordinance or regulation." (§ 810.6.) The trial court correctly observed that while the MOU was approved by resolution adopted by the city, it was not "passed in the manner and with the statutory formality required in the enactment of an ordinance." (See *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091-1092 [development agreement between a city and developer was not an "enactment" within meaning of the statute creating liability for a public entity's failure to discharge a mandatory duty]; *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1395, fn. 22 [contract between an operator of a private

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[5] Article 19, part B, as relevant here defines a "normal work day" as "either twelve (12) consecutive hours of work in a twenty-four hour period; ten (10) consecutive hours of work in a twenty-four (24) hour period; or eight (8) consecutive hours of work in a twenty-four (24) hour period."

[6] Article 27, part C, provides that "Annually, . . . each employee shall undergo a physical examination at city's expense, to be performed by a licensed physician of employee's choice."

correctional facility and the state was not an "enactment" within meaning of the statute creating liability for a public entity's failure to discharge a mandatory duty].) Accordingly, leave to amend was properly denied on this basis.

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.